82-135

No.

Office - Supreme Court, U.S.
FILED
JUL 21 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1982

SEARS, ROEBUCK AND COMPANY,
Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
WASHINGTON SUPREME COURT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the use tax imposed by RCW 82.12.010(5) upon the distribution of certain publications "a tax laid specifically on the exercise" of First Amendment rights, and therefore unconstitutional?

2. Is Washington's narrow revenue interest in RCW 82.12.010(5) a sufficiently substantial government interest to justify infringement of commercial speech?

3. Is the tax imposed by RCW 82.12.010(5) unconstitutionally overbroad because it is susceptible of application to fully protected noncommercial speech?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

Sears, Roebuck and Company ("Sears")[1], appellant herein, appeals from the April 22, 1982 decision of the Washington Supreme Court upholding the constitutionality of RCW 82.12.010(5), which taxes distribution of commercial publications.

The Washington Supreme Court's opinion (A-1-5) is published at 97 Wn.2d 260, 643 P.2d 884 (1982). The opinion of the Thurston County Superior Court (A-7-15) is unreported.

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1. The case caption contains the names of all parties. Sears has no parent company. Other than wholly owned subsidiaries, Sears owns at least 20% of the following companies: Universal-Rundle Corporation; Roper Corp.; DeSoto, Inc.; Kellwood Company; Armstrong Co.; Simpson-Sears Limited (Canada); Sears, Roebuck de Mexico, S.A.; and Sears, Roebuck de Venezuela, S.A.

GROUNDS OF JURISDICTION

The opinion of the court below was filed on April 22, 1982 (A-1). In Washington, no separate judgment is entered. The mandate was entered on May 17, 1982 (A-6).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2)(1976). Notice of appeal to this Court was duly served on July 14, 1982 and timely filed in the Washington Supreme Court on July 16, 1982 (A-18). *See* 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Statutes: The Washington use tax is imposed by RCW 82.12.020, which provides in pertinent part:

> There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within the state as a consumer any article of tangible personal property purchased at retail . . . .

The term "consumer" is defined in RCW 82.12.010(5), which provides in pertinent part:

> "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.

STATEMENT OF THE CASE

Sears distributes catalogs to advertise its wares within Washington State. Washington assessed a "use" tax on that distribution — relying on a definition of "consumer" tailored to such a purpose. That definition, grafted on to the use tax statute by amendment, provides:

> "Consumer" . . . shall also mean any person who distributes . . . any article of tangible personal property . . . the primary purpose of which is to promote the sale of products or services. (RCW 82.12.010(5))

Sears commenced an action in Superior Court for Thurston County, Washington, for refund of use tax assessed and paid on the distribution of catalogs. That court awarded Sears partial summary judgment on an issue of statutory construction, from which neither party appealed. However, the trial court also held that the free distribution of commercial publications is not protected from taxation by the First Amendment to the United States Constitution. (A-12). The superior court granted the Washington Department of Revenue's Motion for Partial Summary Judgment on this constitutional issue (A-16), and the Washington Supreme Court affirmed (A-1-5). Sears filed a timely notice of appeal to this Court (A-18).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. Introduction

In upholding the challenged tax, the Washington Supreme Court purported to apply this principle:

> A general tax which only tangentially impacts constitutionally protected speech is valid.

(A-2). The court concluded that the tax is "general", but utterly failed to address its premise that the tax "only tangentially impacts constitutionally protected speech." Instead, the court assumed the *non sequitur* that because a tax is "*general*" its impact on protected speech is automatically "*tangential.*" Answering the "general vs. special tax" question does not address, much less answer, the "direct vs. tangential impact" question which is critical here. The Washington Court's total failure to analyze its "tangential impact" assumption leaves its holding squarely in conflict with this Court's decisions prohibiting taxes imposed directly on the exercise of the free speech right.[2]

Where a restraint falls directly on commercial speech, this Court has given protection against state interests far more powerful than Washington's weak revenue interest. The

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2. *See Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

court below did not even attempt the commercial speech analysis formulated by this Court.[3]

Finally, the statute's "primary purpose" test results in taxation of fully protected noncommercial speech — unconstitutional overbreadth ignored by the court below.

The Court may wish to consolidate this appeal with *Minneapolis Star & Tribune Co. v. Commissioner*, 314 N.W.2d 201 (Minn. 1981), *prob. jur. noted*, 50 U.S.L.W. 3994 (June 21, 1982) (No. 81-1839). In both cases a state supreme court has upheld a use tax imposed upon activities protected by the First Amendment on the ground that the tax is a general tax only tangentially impacting protected speech. Each appeal, however, also presents several unique questions, so that judgment in one appeal would not be dispositive of the other. The unique questions herein involve the directness of the impact, the infringement of commercial speech, and overbreadth.

II. Washington May Not Impose a Tax Directly on the Exercise of Free Speech.

A. *Washington's Tax Impacts Speech Directly, Not Tangentially.*

Distribution of a publication is speech.[4] It is on Sears' speech — the act of distributing its publication — that Washington imposes its specially designed use tax under RCW 82.12.010(5). The vice of the instant tax is, therefore, that it is imposed *directly on the exercise* of the free speech right.

The critical distinction is the one made by this Court in *Murdock v. Pennsylvania*:

> It is one thing to impose a tax on the *income* or *property* of a preacher. It is quite another to exact a tax from him for the *privilege of delivering a sermon.*

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3. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

4. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Rosen v. Port of Portland*, 641 F.2d 1243, 1245 (9th Cir. 1981).

319 U.S. 105, 113 (1943) (emphasis added). A tax on a speaker's income or property is constitutionally acceptable because its impact on speech, if any, is incidental or "tangential." Therefore, Sears claims no immunity from the ordinary forms of state taxation on sales, income or property which may indirectly affect its publications.[5] By contrast, the incident of the instant tax, like the one proscribed in *Murdock*, is the very act of speech itself. An impact could not conceivably be more *direct*.

B. *The State May Not Directly Tax the Exercise of Free Speech.*

This Court struck down an ordinance imposing a license tax on the privilege of distributing religious literature in *Murdock v. Pennsylvania, supra*, stating:

> It could hardly be denied that a tax laid *specifically on the exercise* of [First Amendment] freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.

319 U.S. at 108 (emphasis added).

This Court has consistently struck down taxes which burden the exercise of the First Amendment right to distribute publications. *See, e.g., Follett v. McCormick*, 321 U.S. 573, 577 (1944).

The Washington court upheld the instant tax solely on the ground that

> [T]his is a general tax for the support of government which under the test of [*Grosjean*] is not violative of the First Amendment.

(A-4). On that basis the court concluded that "there is no constitutional issue." (A-4)

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5. *See Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Under the *Murdock* rule, the following taxes imposed on Sears would be "tangential" and proper: (i) Washington's tax on sales resulting from Sears' catalog advertising; (ii) local property tax on catalogs held by Sears within the state; (iii) state income taxation; (iv) a tax on the exercise of the selling privilege, if Sears should choose to sell its speech by charging for its catalogs.

But a tax applied directly to the transfer of information — to the exercise of the protected right — is not saved by being "general."[6] It would be absurd to say, for example, that a tax on a particular preacher's sermons could be saved by expanding it to all sermons or even to all speech. Nor can a tax on speech be redeemed by association with a broad tax on other subjects. The ease with which this tax on commercial speech was grafted onto Washington's general use tax illustrates the vulnerability of "protected speech" if general application were the sole test. The taxes proscribed in *Murdock* and *Follett* were *general* taxes (*i.e.*, not narrowed to particular persons or things), which nonetheless failed constitutional muster because their impact on protected speech was *direct*. Indeed, the Washington court's statement that "[a] general tax *which only tangentially impacts* constitutionally protected speech is valid" impliedly concedes that being "general" is not enough. The court erred by failing to follow its concession with an analysis whether the impact of Washington's commercial speech tax is direct or tangential, an issue which was fully briefed by both parties.[7]

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6. A law can be "general" merely by not relating to *particular* persons (or things):

> The authorities are in substantial harmony upon the rule by which a law is to be tested to determine whether it is general or special. A special law is one which relates to particular persons or things, while a general law is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions.

Libby, McNeill & Libby v. Ivarson, 19 Wn.2d 723, 730, 144 P.2d 258 (1943). *Compare Young Men's Christian Association v. Parish*, 89 Wash. 495, 154 P. 785 (1916) (statutory provision exempting YMCA exclusively and by name from state property tax held an unconstitutional "special" law).

7. In *Minneapolis Star & Tribune Co. v. Commissioner*, 314 N.W.2d 201 (Minn. 1981), *prob. jur. noted*, 50 U.S.L.W. 3994 (June 21, 1982) (No. 81-1839), the Minnesota Supreme Court held that application of a general use tax to the consumption of paper and ink to produce a newspaper subsequently sold to the public did not violate freedom of the press. While

By upholding a tax imposed specifically on speech, the Washington court has created a conflict with this Court's First Amendment decisions.

III. This Court Has Protected Commercial Speech Against State Interests Far More Powerful Than Washington's Weak Revenue Interest.

This Court has defined commercial speech as "commercial advertisements of goods and services for sale," and has held that such speech "enjoys a substantial degree of First Amendment protection . . ."[8] It is undisputed that Washington's tax impacts, and that Sears' catalogs contain, constitutionally protected commercial speech.

This Court requires the advancement of a "substantial government interest" to justify infringement of commercial speech,[9] and has protected commercial speech against

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Footnote 7 (con't)

recognizing that *Murdock* and *Follett* involved general taxes, the *Minneapolis Star* court found those precedents inapposite because the case before it involved "the application of an ordinary use tax to revenue-producing, commercial activity throughout the state." 314 N.W.2d at 208. The Washington Supreme Court adopted the quoted language *verbatim*, ignoring two crucial distinctions between *Minneapolis Star* and the instant case. Whereas the *Minneapolis Star* newspaper was "revenue-producing", Sears' catalogs are distributed *free*. Even more importantly, the impact of the tax in *Minneapolis Star* was not *direct*, as it is here. *Thus*, if *Murdock* and *Follett* were inapposite in *Minneapolis Star* because the tax on a *revenue-producing activity* there *tangentially* touched speech, the same considerations make those cases controlling here. Both *Murdock* and *Follett*, like the instant case, involved general taxes *directly* impacting the *free* distribution of constitutionally protected literature.

8. *Metromedia v. City of San Diego*, 453 U.S. at 505.

9. This Court has adopted a four-part test for determining the validity of governmental restrictions on commercial speech: (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial government interest, (3) directly advances that interest, and (4) reaches no farther than necessary to accomplish the given objective. 453 U.S. at 507.

countervailing state interests far stronger than any asserted here. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[10] and *Bates v. State Bar of Arizona*,[11] powerful state interests in maintaining professionalism of pharmacists and lawyers, respectively, failed to justify restrictions on commercial speech. Racial integration [12] and energy conservation [13] have likewise failed to vindicate such infringements.

In contrast to these cogent public policy objectives, the instant statute is nothing more than a tool to raise money — weak in revenue impact but mighty in potential for First Amendment mischief. Indeed, a tax on advertising is one of the classic forms of the "taxes on knowledge" which the First Amendment was designed to forbid.[14]

We emphasize the narrowness of Washington's revenue interest. Sears does not seek to invalidate the entire Washington use tax — only the *incremental* revenue generated by RCW 82.12.010(5). That statute extends the tax's reach to publications by defining a "consumer" — not as one who reads or consults the publication — but as one who *distributes* it.[15] While the basic use tax has broad revenue impact, this extension of it does not. The revenue value of any tax, as it applies to speech, is inherently apt to be slight.

More importantly, a revenue interest is *categorically insufficient* to justify direct taxation of protected speech. As this Court has warned, "[t]he power to tax the exercise of a privilege is the power to control or suppress its

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10. 425 U.S. 748 (1976).

11. 433 U.S. 350 (1977).

12. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).

13. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

14. *See Grosjean v. American Press Co.*, 297 U.S. 233, 245-249 (1936).

15. This special definition of "consumer" was added by amendment. *See* 1955 Wash. Laws 389 § 24.

enjoyment."[16] Any attempt, therefore, to broaden the revenue value of a tax on speech (*e.g.*, by extending it from the "preacher's sermon" to all speech) is doomed to failure. The broader the revenue base, the greater the suppression of speech.

IV. Washington's Tax Is Invalid On Its Face Because It Burdens Protected Noncommercial Speech.

The tax applies to distributions of any publication, except newspapers, the "primary purpose of which is to promote the sale of products or services." RCW 82.12.010(5). Determining what is or is not speech whose purpose is sales promotion is not as straightforward as it may first appear. Defining "commmercial speech" as "speech proposing a commercial transaction,"[17] this Court has emphasized "the difficulty in making a determination that speech is either 'commercial' or 'noncommercial.'"[18] "This line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw. . . ."[19] Professor Tribe's example captures the problem's essence:

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16. *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). In striking down such taxes, the courts have consistently distinguished a "nominal fee" imposed to defray the cost of administering legitimate regulation of First Amendment activity; where the taxing authority has not met its burden of proving that the tax was *limited* to that purpose, the tax has been held unconsitutional. *See Murdock v. Pennsylvania*, 314 U.S. at 113-114, 87 L.Ed. at 1299; *Bayside Enterprises, Inc. v. Carson*, 450 F. Supp. 696, 704-706 (M.D. Fla. 1978); *Moffett v. Killian*, 360 F. Supp. 228, 231-232 (D. Conn. 1973) (three-judge court). That fact is not surprising, since a revenue interest can be asserted on behalf of every tax, including every tax on speech which the courts have struck down. If that omnipresent interest could justify infringement of First Amendment rights, the Constitution would afford them precious little protection. Yet the Washington Department of Revenue has offered no other justification for the instant tax.

17. *Virginia State Board of Pharmacy, supra*, 425 U.S. at 762.

18. *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 539 (Brennan, J., concurring) (citing examples).

19. *In re Primus*, 436 U.S. 412, 438 n.32 (1978).

> [I]s the coal company's ad proclaiming its concern for environment and warning of the hazards of nuclear fuel commercial speech or political expression?[20]

When a publication serves important noncommercial as well as commercial purposes, a state tax official must judge which is "primary" under Washington's statute. If a commercial purpose is deemed "primary," then the tax applies. That official thus determines what speech receives how much constitutional protection.[21]

If the use tax is imposed under the statute's "primary purpose" test, then the *entire* communication — both commercial and noncommercial content — is taxed. A religious tract may both proselytize and promote sales of religious literature and objects. An outfitter's catalog may advocate wilderness preservation and environmental legislation, in addition to promoting the sale of clothes and equipment. *All* such speech is subject to this tax.

Legislation susceptible of application to unconditionally protected speech is unconstitutionally overbroad and therefore invalid on its face.[22] The statute at issue is not

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20. L. Tribe, *American Constitutional Law* at 656 (1978).

21. This Court has long recognized the danger of leaving to administrative officials the determination of what is protected speech. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court invalidated a statute requiring a license to solicit for religious causes. To condition the exercise of the protected right upon "a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Id.* at 307. Vesting such discretion in administrative officials has been "consistently condemned" by this Court. *Kunz v. New York*, 340 U.S. 290, 293 (1951).

22. *Lewis v. New Orleans*, 415 U.S. 130, 131 (1974). This Court has suggested that overbreadth analysis "applies weakly, if at all, in the ordinary commercial context." *Bates v. State Bar of Arizona*, 433 U.S. at 380. We respectfully request the Court to distinguish two distinct types of commercial speech cases to determine whether overbreadth analysis may properly be invoked:

> (1) where the litigant's speech is *unprotected (e.g.*, obscenity, libel) and the allegedly overbroad statute also infringes "substantially

narrowly drawn to tax only commercial speech. It necessarily taxes noncommercial speech associated with commercial speech whenever a state tax official deems sales promotion the primary purpose of the publication.[23] Taxation of protected noncommercial speech is indisputably unconstitutional. Because the statue applies primarily, rather than exclusively, to commercial speech, it reaches too far into the area of fully protected speech.

Footnote 22 (con't)

protected" commercial speech (as opposed to *fully* protected noncommercial speech); and

2) where the litigant's speech is "*substantially protected*" commercial speech and the allegedly overbroad statute also infringes *fully protected* noncommercial speech (*i.e.*, the situation in the instant case).

It is well established that a *completely unprotected* speaker may invoke overbreadth analysis where a statute also infringes *fully protected* speech. *E.g., Gooding v. Wilson*, 405 U.S. 518, 520-522 (1972) ("fighting words"). It would be anomalous if a *completely unprotected* speaker, but not a *substantially protected* commercial speaker, could invoke overbreadth analysis — to challenge a statute also infringing fully protected speech. Therefore, the logical import of the *Bates* statement must be that *completely unprotected* speech may not trigger overbreadth analysis where the statute also infringes speech that is merely substantially protected commercial speech — the first situation outlined above. The instant case falls into the second category — an infringement of fully protected (noncommercial) speech — to which the overbreadth doctrine logically applies.

23. Whether Sears' speech is strictly commercial, or multipurpose, is irrelevant for overbreadth analysis. *See NAACP v. Button*, 371 U.S. 415, 432 (1963).

CONCLUSION

The decision of the Washington Supreme Court undermines fundamental First Amendment principles and conflicts with decisions of this Court. The questions presented by this appeal are substantial. Sears urges this Court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

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APPENDIX A

SEARS & ROEBUCK v. DEPARTMENT OF REVENUE Apr. 1982 97 Wn.2d 260

[No. 47821-0. En Banc. April 22, 1982.]

SEARS, ROEBUCK AND COMPANY, *Appellant*, v. THE DEPARTMENT OF REVENUE, *Respondent*.

[1] **Taxation — Freedom of Speech — Tangential Impact — Validity.** A tax of general applicability which has only a tangential impact on constitutionally protected speech is valid.

[2] **Taxation — Use Tax — Items Promoting Sales — Validity.** RCW 82.12.010(5), which makes the use tax applicable to the distribution of items other than newspapers to promote sales, is part of a general statewide tax for the support of government and does not violate the First Amendment.

[3] **Taxation — Use Tax — Distribution of Catalogs.** The distribution of catalogs to customers from retail stores within the state for the purpose of promoting sales is subject to the use tax.

NATURE OF ACTION: A company which sold merchandise through catalogs sought a refund for use taxes paid for its distribution of catalogs within the state.

SUPERIOR COURT: The Superior Court for Thurston County, No. 78-2-0054501, Frank E. Baker, Jr., on June 16, 1981, granted a summary judgment upholding the tax on catalogs distributed to customers from retail stores within the state and invalidating the tax on catalogs shipped directly to customers from out of state.

SUPREME COURT: Holding that application of the use tax did not violate the First Amendment, the court *affirms* the judgment.

Bogle & Gates, John T. Piper, D. Michael Young, and *James H. Lowe*, for appellant.

Kenneth O. Eikenberry, Attorney General, and *Jeffrey D. Goltz, Assistant*, for respondent.

DOLLIVER, J.—Between April 1968 and March 1977, plaintiff Sears, Roebuck and Company distributed catalogs in Washington for the purpose of promoting sales of its products. The catalogs described Sears' merchandise and listed the prices. Many of the catalogs were shipped from the printer in Chicago to customers in Washington by way of common carriers. The remainder of the catalogs were shipped from the printer to Sears retail stores in Washington and distributed to customers from the store.

The Department of Revenue assessed use taxes under RCW 82.12 for Sears use of the catalogs between 1968 and 1977. Sears paid the taxes and then filed the present action for a refund. The trial court held the catalogs shipped directly from the Chicago printer to Sears customers had not been "used" by Sears within the meaning of RCW 82.12. Sears' motion for summary judgment awarding it a refund for taxes paid on these catalogs was granted. No appeal was taken by the State. The court also held those catalogs shipped directly to Sears stores and then distributed to the customer over the counter or otherwise were subject to the use tax. Sears appealed from that portion of the judgment holding these catalogs subject to the use tax.

[1] In *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 80 L. Ed. 660, 56 S. Ct. 444 (1936), although the court struck down a Louisiana license tax on certain newspapers, it limited its holding by stating:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.

A general tax which only tangentially impacts constitutionally protected speech is valid. *See Minneapolis Star & Tribune Co. v. Commissioner*, 314 N.W. 2d 201 (Minn. 1981); *Steinbeck v. Gerosa*, N.Y.2d 302, 313, 151 N.E.2d 170, 175 N.W.S.2d 1, *appeal dismissed*, 358 U.S. 38 (1958).

Sears claims, however, citing *Follett v. Town of McCormick*, 321 U.S. 573, 88 L.Ed. 938, 64 S. Ct. 717, 152

A.L.R. 317 (1944) and *Murdock v. Pennsylvania*, 319 U.S. 105, 87 L. Ed. 1292, 63 S. Ct. 870 and 891 (1943), that the use tax is a tax on the exercise of free speech itself and is thus unconstitutional. These cases are not in point. *See Steinbeck v. Gerosa*, *supra* at 313. We concur with the analysis made by the Minnesota Supreme Court in *Minneapolis Star & Tribune Co. v. Commissioner*, *supra*, at 208, that the ordinances in *Follett* and *Murdock* required distributors or nonprofit sellers of religious material to pay a fee for a license to sell or distribute their material. Neither case considered the question raised here of the application of an ordinary use tax to revenue producing commercial activity throughout the state.

Sears next argues that its catalogs have been specifically taxed because, although the use tax is a tax of general application, a 1955 amendment to the use tax statute (RCW 82.12.010(5) singles out commercial catalog distribution and is thus subject to the constitutional infirmity first pointed out in *Grosjean*.

RCW 82.12.020 imposes a tax "for the privilege of using within this state as a consumer any article of tangible personal property . . ." Although the meaning of consumer has been subsequently broadened (RCW 82.04; RCW 82.08), prior to 1955 the legislature defined "consumer" as "[a]ny person who purchases, acquires, owns, holds or uses any article of tangible personal property other than for the purpose of resale as tangible personal property in the regular course of business . . ." Laws of 1949, ch. 228, § 2(r)(1), p. 816, 822.

In 1955, the legislature added the following language:

> "Consumer," in addition to the meaning ascribed to it in [RCW] chapters 82.04 and 82.08 insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property, except newspapers, the primary purpose of which is to promote the sale of products or services.

Laws of 1955, ch. 389, § 24(5), p. 1652. It is this language which Sears claims violates the First Amendment.

While the record indicates controversy as to the applicability of the pre-1955 language to catalogs shipped to the state and distributed by the taxpayer, it is the claim of the Department of Revenue that even without the 1955 amendment to the definition of "consumer", Sears is covered under the broad language of the pre-1955 definition as a "person" who "holds or uses . . . tangible personal property".

Furthermore, the partial stipulation of facts contains a copy of a letter from the Washington State Tax Commission (predecessor to the Department of Revenue) notifying Montgomery Ward and Company regarding the pre-1955 use tax. In that ruling, the Commission stated:

> We conclude that the Compensating [u]se Tax is applicable to the use within the State of Washington of those catalogs which are sent by rail to designated agents of Montgomery Ward in the State of Washington and which are then mailed to customers in Washington for use in this state.

We concur with the Department that the pre-1955 statute without the 1955 amendment language was sufficient to cover the transactions in this case.

[2,3] Even if we were to accept the argument of Sears that only after the 1955 amendment did the use tax apply to catalogs, we still would hold the tax to be valid. It is not contested that the 1955 amendment is part of the general use tax statute. *See generally Note, Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 994 (1962). The 1955 amendment is part of a general statewide tax; it is not "single in kind". Neither the use tax nor the amendment is alleged by plaintiff to have a "long history of hostile misuse against the freedom of the press." *Grosjean v. American Press Co., supra.*

We believe the record and the history regarding the application of the use tax to the Sears catalogs demonstrates this is a general tax for the support of government which under the test of *Grosjean v. American Press Co., supra*, is not violative of the First Amendment. Since this is the nature of the tax, there is no constitutional issue involved. Therefore, it is unnecessary to consider whether the "commercial

speech" which Sears claims it is exercising is afforded First Amendment protection or whether the statute is constitutionally overbroad since it might apply to noncommercial as well as commercial speech.

Affirmed.

BRACHTENBACH, C.J., and ROSELLINI, STAFFORD, UTTER, WILLIAMS, DORE, DIMMICK, and PEARSON, J.J., concur.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

SEARS, ROEBUCK AND COMPANY, Appellant,	)	MANDATE
	)	No.47821-0
	)	THURSTON
v.	)	County No.
THE STATE OF WASHINGTON,	)	782005451
	)	
DEPARTMENT OF REVENUE, Respondent.	)	DOCKETED
	)	

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on April 22, 1982, became the decision terminating review of this court in the above entitled case on May 12, 1982. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.3, costs are taxed as follows: $132.78 in favor of respondent and against appellant.

cc:
Bogle & Gates
Mr. John T. Piper
Mr. D. Michael Young
Mr. James H. Lowe
Hon. Ken Eikenberry
Attorney General
Mr. Jeffrey D. Goltz, Asst.
Reporter of Decisions
Hon. Frank E. Baker, Judge
Thurston Co. Superior Court

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of May, A.D. 1982

/s/ JOHN J. CHAMPAGNE
Clerk of the Supreme Court, State of Washington

APPENDIX C

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

SEARS, ROEBUCK & CO., Plaintiff,	)	NO. 78-2-00548-1
vs.	)	MEMORANDUM
STATE OF WASHINGTON DEPARTMENT OF REVENUE, Defendant.	)	OPINION
	)	DOCKETED

This matter having come regularly on for hearing upon cross-motions for Partial Summary Judgment, and the Court having examined the file and exhibits therein, read the Partial Stipulation of Facts, studied all briefings offered the Court and having listened to oral argument on the issues, now enters its Memorandum Opinion as follows:

Three issues for determination have been presented to the Court for decision:

1. Whether this distribution of catalogs constitutes communication to customers and is thus protected by the First Amendment of the Const. of the U.S. from the State's imposition of the use tax.

2. Whether, under out statutes, plaintiff "uses" the catalogs as a "consumer," and/or whether such distribution of preaddressed catalogs sent from out of state is taxable under out statutes and the commerce clause.

3. Whether such distribution is protected from retroactive assessment if found taxable.

The material facts necessary for the Court's decision are summarized as follows:

Sears, the plaintiff, from April, 1968 to March, 1977, has distributed catalogs within this state to promote the sales of its products by communicating to potential customers what plaintiff has to sell and at what price. During this period, plaintiff would send a shipping order and address labels to the printer in Chicago who attached the labels,

bagged the catalogs and delivered them to a local common carrier for delivery to this state by the following methods:

1. *Common rail carrier to post office.* Catalogs designated for mailing to customers from the Spokane Post Office were shipped by common rail carrier. They were consigned to Sears in care of the United States Post Office which unloaded and mailed them.

2. *Common rail carrier to post office with assistance to post office by Sears employees.* Distributions through the Seattle Post Office were made in the same manner as at Spokane except that Sears employees assisted in the car unloading to speed it up. Post Office employees placed a Post Office conveyor inside the car. Several Sears employees entered the car and placed the bags of catalogs on the conveyor which moved them to the Post Office dock where Post Office employees removed them for placing in the mails.

3. *Common rail carrier to common motor carrier to Post Office.* For smaller cities in Washington the transport between the rail carrier and Post Office was provided by a common motor carrier. The catalogs were consigned to Sears in care of the motor carrier.

4. *Common rail carrier to distributing company.* The distributing company unloaded the catalogs from the rail cars and delivered them to customers. The catalogs were consigned to plaintiff in care of the distributing company.

Such catalogs were never diverted or recalled once the labels were sent to Chicago.

In February, 1960 defendant advised plaintiff in writing that plaintiff would not be held responsible for the use tax on the value of catalogs mailed direct to customers from outside the state. (Ex. 1) Thus no tax was assessed on methods 1, 2, and 3 for the period 1954 to 1967. (See ex. 2) However, the defendant has assessed use tax for the period 1967 to 1977. Since that time distribution has been made in the same manner as set forth in methods 1, 2, and 3 except as to 2 plaintiff employees no longer participate in the unloading.

COMMUNICATION—FIRST AMENDMENT

Va. Pharmacy Bd. Va. Consumer Council, 425 U.W. 748, has declared that "commercial speech" is protected by the First Amendment to the Constitution. Pharmacists like so many other professions which in the past have regulated themselves as to advertising, i.e., attorneys, physicians, etc., have now been declared as being free to advertise, in general, subject to subsidiary possible restrictions which are not material to this case. This case, in fact says nothing more. No question as to the taxation of "commercial speech" was in issue. The attack was on the constitutionality of a Virginia statute which provided in part:

> "Any pharmacist shall be considered guilty of unprofessional conduct who (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium discount rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

The United States Supreme Court held that this bar was violative of freedom of speech by way of communication to the public and thus protected by the First Amendment — "it does no more than propose a commercial transaction." The Court in concluding its opinion stated however, that "commercial speech, like other varieties, is protected, but we do not hold that it can't be regulated in any way."

> "What is at issue is whether a State may completely supress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients .... we conclude the answer to this one is in the negative."

Linmark Associates Inc. v. Willingboro, 431 U.S. 85 involved an ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the township perceived as the flight of white homeowners from a racially integrated community. The Court held the ordinance as violative of the First Amendment, citing the *Virginia Pharmacy* case, *supra*, to

the effect that such action restricted the free flow of truthful commercial information. The Court did point out that there could be differences under the First Amendment protection depending upon the restriction of a given form of commercial enterprise. That Court stated that in *Virginia Pharmacy, supra*, it was argued that such prescription advertising would reduce the prestige of the profession and in turn, the health and safety of the public. However, they held that such a ban on advertising was insufficient or unnecessary to achieve the goal when in fact, it restricted the free flow of truthful information. Thus the same result in *Linmark, supra*.

> "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

Certainly these two cases discussed in some detail do not hold that one engaged in "commercial speech" is not subject to proper general taxation within a class unless we are willing to hold that any taxation, no matter how legitimate or necessary restricts the free flow of truthful information.

Thus we must turn to *Grosjean v. American Press Co.* 297 U.S. 233. There it was held that a state license tax imposed by statute upon the owners of newspapers for the privilege of selling or charging for advertising therein, and measured by a percent of the gross receipts from such advertisements, but applicable only to newspapers enjoying a circulation of more than 20,000 copies per week, was unconstitional. It was a special tax directed to a select few, and would seem obviously unconstitutional. The restriction of freedom of the press to immunity from censorship was cured by the First Amendment, and was adopted primarily to negate any form of previous restraint upon printed publications or their circulation, including restraint by the taxation of newspapers and their advertising.

Grosjean, supra, concluded however, that

> "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary tax,

> but one single in kind, with a long history of hostile misuse against the freedom of the press . . . . . The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties."

Let us turn next to *H & B Communications Corp. v. Richland*, 79 Wn. 2d 312 which involved the collection of a B & O tax from the appellant who operated a community antenna television system. Richland enacted an ordinance which levied such tax on the business of "transmitting" television by cable. The tax was based on a percentage of the gross income from the business. The taxpayer transmitted television programs to the listener-viewer via a coaxial cable and carried programs originating from eight television stations and three FM radio stations. The programs involved national and local news broadcasts, religious broadcasts, communications originating from governmental agencies and educational programs which were federally subsidized. For these services the viewer paid a monthly fee.

The court held that even though such such activity constituted interstate commerce that in itself did not negate the tax, the court applying both the discrimination test and the multiple burden test. The Court went on:

> "It is argued that the Richland business and occupation tax abridges the First Amendment freedoms of speech, press and religion as guaranteed by the United States constitution. In support of this contention, appellant relies heavily upon Grosjean v. American Press Co., 297 U.S. 233. Therein the Court said in part:
>
> > "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the of the ordinary forms of taxation for support of the government."
>
> Furthermore, in the case at bar there is not any suggestion of the tax being a pretext to impose

> censorship. Grosjean does not support the position of the appellant. The First Amendment freedoms of speech and press are not abridged by the business and occupation tax in question."

The Court concluded by summarily denying arguments involving the equal protection and due process clauses of the constitution.

This court is well aware that the expansion of "commercial speech" to be under the First Amendment umbrella as exemplified by *Virginia Pharmacy, supra*, and *Linmark, supra*, are subsequent decisions to *H & B Communications, supra*. Nevertheless this Court is being asked to hold that such protection exempts Sears from the general taxing powers of the State. I do not believe that in light of Washington decisions I can go that far. Thus we must look to the legitimacy and imposition of the use tax as it applies to the facts of this case.

STATUTES—USE—CONSUMER

Before the Court discusses the issues resulting from the imposition of the use tax upon plaintiff, it is necessary to set out the pertinent statutes as they relate hereto, as follows:

RCW 82.12.020:

> "There is hereby levied and there shall be collected from every person in this state a tax or excise for the privilege of using within this state as a consumer any article of tangible personal property purchased at retail, . . . This tax will not apply with respect to the use of any article of tangible personal property purchased, . . . outside this state until the transportation of such article has finally ended or until such article has become commingled with the general mass of property in this state . . . ."

RCW 82.12.010(2) defines "use:"

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the first act within this state by which the taxpayer takes or assumes dominion or control over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage,

> or any other act prepatory to subsequent actual use or consumption within this state;"

RCW 82.12010(5) which provides:

> "Consumer," in addition to the meaning ascribed to it in chapters 82.04 and 82.08 RCW insofar as applicable, shall also mean any person who distributes or displays, or causes to be distributed or displayed, any article of tangible personal property . . . of which is to promote the sale of products or services."

Finally we must examine RCW 82.04.050(5) defining a retail sale:

> "'Sale at retail' or 'retail sale' means every sale of personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business . . . other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person . . ."

There is no problem herein concerning the taxing of those catalogs which are sent directly to the Sears stores and then distributed to the customer over the counter or otherwise. In such case the use tax attaches to the value of the catalogs, for not only has there been "dominion and control" over the article but likewise the transportation has "finally ended." It is also clear that under the present definition in RCW 82.12.010(5) that Sears became a "consumer" by its advertising process.

However, as to methods (1), (2), and (3) initially set forth in this option we have a different situation. It should be remembered that these catalogs upon leaving Chicago have never been diverted or recalled at any time. They are sent through the mails with short pauses while in the custody of the Post Offices for further distribution to the addresses, the ultimate users of the catalogs. It is difficult for the Court to envision a practical dominion or control as intended by the legislature which occurs during the transporting process directed by the United States Post Offices or other common carriers within the State for further distribution. To do so would necessitate the finding that there is some form of agency between the plaintiff and government or other common carriers.

The Court also believes that it must harmonize the statutes cited if at all possible. The transporting from out of state and distribution pauses fall short of the exception to RCW 82.12.020—"until the transportation of such article has *finally* ended." It only makes sense that such articles are not "used" within the state until dominion and control are at the direction of Sears for the purpose intended, namely the advertising of the products and their prices. Prior to that time the articles are still in interstate transit.

Pope & Talbot v. Revenue, 90 Wn. 2d 191 concurs with this Court's interpretation, in that "we do not depart from the ordinary meaning of the words in a statute absent some ambiguity and/or statutory definition." The exception in .020 is not ambiguous and the Court is of the belief that "final" means just what it says before such transit can be relieved of its interstate character. *Pope & Talbot, supra*, in discussing the airplane in that case is analogous to the fact pattern at bar. There our Supreme Court stated:

> "Whatever might constitute the final end of any airplanes journey, it can hardly be said to occur every time the plane lands. The word "final" connotes something more ultimate and substantial than that."

This Court holds that the transporting under the facts of this case do not constitute the first act by which dominion and control is assumed and further that the exception is applicable for such transportation has not finally ended. There is such inconsequential difference in the modes of transportation under methods (1), (2) and (3) that my ruling applies to all three.

The Court has also studied the question of estoppel or retroactive assessment. Although not necessary to the general holding of the Court, it is quite obvious that in examining the Exhibits in this cause that should the Court be in error in its holding, certainly the tax could only attach in the future. All other points raised in argument I believe to be disposed of by this Opinion.

The Court will sign the appropriate pleadings upon presentation.

Dated this 19 day of November, 1980.

/s/ Frank E. Baker
FRANK E. BAKER, JUDGE

APPENDIX D

IN THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

SEARS, ROEBUCK AND CO., Plaintiff,	)	NO. 78-2-00545-1
	)	ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT
v.	)	
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Defendant.	)	

This matter came on regularly for hearing before the above-entitled Court on September 15, 1980, on the cross motions of Plaintiff and Defendant for partial summary judgment with respect to use tax on Plaintiff's catalogues. The Court considered the partial stipulation of facts and exhibits thereto; the opening and reply briefs of the parties; the amended notice of appeal of Plaintiff; Defendant's answer and counterclaim; heard the argument of counsel; and on November 19, 1980, entered a Memorandum Opinion stating its decision on these matters.

In accordance with its previous Memorandum Opinion, the Court now makes this its Order with respect to the issues raised by the above-described motions.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT, there being no genuine issues of material fact with regard to the methods of distributing Plaintiff's catalogues in this state and with regard to the Department of Revenue's prior rulings on the taxability under Chapter 82.12 RCW of Plaintiff's catalogues, the parties are respectively entitled to judgment as a matter of law as follows:

(1) That with respect to the claim alleged in ¶ 9A of Plaintiff's amended Notice of Appeal, use tax on Plaintiff's catalogues distributed within this state is not barred by the

freedom of speech provisions of the First Amendment to the United States Constitution. Plaintiff's motion for partial summary judgment in this regard is therefore Denied and the motion of Defendant for dismissal of said claim is Granted;

(2) That with respect to the claim alleged in ¶ 9B of Plaintiff's amended Notice of Appeal, use tax on Plaintiff's catalogues distributed in the manner described in ¶ 4 of the Partial Stipulation of Facts is prohibited by the provision of RCW 82.12.020 which states that the tax shall not apply until transportation of the taxed goods has finally ended and is also prohibited because such distribution does not constitute a taxable use of the catalogues. The motion of Defendant for dismissal of this claim is therefore Denied and the motion of Plaintiff for partial summary judgment in this regard is Granted; and

(3) That Plaintiff is entitled to judgment awarding refund of use taxes paid on catalogues distributed in the manner described in ¶ 4 of the partial stipulation of facts and Defendant is entitled a judgment dismissing the claim asserted in ¶ 9A of Plaintiff's amended notice of appeal.

DONE IN OPEN COURT THIS 20th day of April, 1981.

/s/ Frank E. Baker
FRANK E. BAKER, JUDGE

Presented By:

KENNETH O. EIKENBERRY
Attorney General
State of Washington

/s/ Michael Madden
Michael Madden
Assistant Attorney General
Attorneys for Defendant.

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SEARS, ROEBUCK AND CO., Appellant,	)	NO. 47821-0
v.	)	NOTICE OF
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, Respondent.	)	APPEAL

Notice is hereby given that Sears, Roebuck and Co., the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington, entered on April 22, 1982, affirming the judgment of the Thurston County Superior Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated this 14th day of July, 1982.

BOGLE & GATES

/s/ John T. Piper

John T. Piper
D. Michael Young
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